HIRENDRA LAL BANNERJI

v.

CHIN CHENG REALTY PTE. LTD.

HIGH COURT, SINGAPORE
FA CHUA J
[SUIT NO. 2187 OF 1977]
3 AUGUST 1982

LANDLORD AND TENANT: *Lease with proviso for extension - Rent subject to assessment - Specific performance - Arrears of rent - Perpetually renewable lease.*

The defendants leased out premises 322-F, Changi Road, to the plaintiff for a ten-year term from August 1957 at a monthly rental of $110 with a proviso for extension. The plaintiff's application for extension of the said lease was rejected in 1967, but he continued to occupy the premises. He was subsequently informed that rental would be increased to $240 from March 1974, to commensurate increase in assessment rates. In April 1977, the plaintiff sought a further extension and instituted proceedings to specifically enforce his agreement.

The defendants served notice to quit by 31 August 1977, and later commenced proceedings to recover arrears of rent at $240 payable from 11 March 1974 with *mesne* profits from 1 September 1977. The plaintiff counterclaimed for specific performance, and contended that he was only liable to mete actual increase in property tax with rent remaining fixed. They further submitted that a perpetually renewable lease had been created. The defendants, however, conceded, even if there was a perpetually renewable lease, the plaintiff's claim was statute barred by s. 6 of the Limitation Act 1956.

He averred that Planning Act 1960 which came into operation in February 1960, had rendered the ten-year extension proviso void.

Held:

[1] The interpretation of the defendants, that rental should be increased based on the annual value was the correct one.

[2] The plaintiff, despite repeated requests, had not paid, nor tendered the correct rental in breach of the contract and was not entitled to renewal of the lease.

[3] The relationship between landlord and tenant was originally of contract, but from early times the contract conferred an estate in land without losing its contractual characteristics. Therefore, s. 6(1)(a) of the Limitation Act is operative.

[4] The Planning Act had rendered a fundamental change in the conditions of the lease whereby the defendants were released from their obligations.

[Claim dismissed with costs.]

Case referred to:
Caerphilly Concrete Products Ltd. v. Owen [1972] 1 WLR 372

Legislation referred to:
Conveyancing and Law of Property Act [Sing], s. 53(1)
Limitation Act [Sing], ss. 6, 6(1)(a)
Planning Act [Sing], ss. 2(1), 9(3), (9)

For the plaintiff - L.A.J. Smith
For the defendants - Giam Chin Toon

JUDGMENT

FA Chua J:

By a lease dated 23 July 1957, made between the parties (the said lease), the defendants demised to the plaintiff all that the premises known as No. 322-F, Changi Road, situate in Singapore in a block of shop houses standing at the junction of Changi Road and Telok Kurau Road, together with the land and a room at the back thereto (the said premises), for a term of ten years from 1 August 1957, at a rent of $110 p.m. subject to increase or decrease "if the assessment on the said premises shall ... be increased or decreased".

By Clause 3 (c) of the said lease the defendants covenanted "That the landlords will on the written request of the tenant made three calendar months before the expiration of the term hereby created and if there shall not at any time of such request be any existing breach or non-observance of any of the covenants on the part of the tenant hereinbefore contained at the expense of the tenant grant to him a lease of the demised premises for a further term of ten years from the expiration of the said term at the same rent and containing the like covenants and provisos as are therein contained including the present covenant for renewal."

By letter dated 3 January 1967, the plaintiff requested the defendants to grant to the plaintiff a further term of ten years from the expiration of the first term, namely on 31 July 1967, on the same terms. The defendants did not grant a further lease.

The plaintiff has since the expiration of the said term remained in possession of the said premises and still remains in possession thereof.

By letter dated 15 March 1974, the defendants informed the plaintiff that the Comptroller of Property Tax had increased the annual value of the said premises from $1320 to $2880 with effect from 11 March 1974, and that the rent would be increased from $110 p.m. to $240 p.m. with effect from 11 March 1974, in accordance with clause 1 of the said lease.

By letter to the defendants dated 22 April 1977, the plaintiff requested the defendants to grant to the plaintiff a further term of ten years from the expiration of the terms, namely from 31 July 1977. The defendants did not grant the said further term.

The plaintiff commenced the present proceedings on 27 July 1977, and now claims to have the said agreements specifically performed by the defendants and to have leases granted to him accordingly from 1 August 1967, and 1 August 1977.

The defendants through their solicitors by letter dated 3 August 1977, gave the plaintiff notice to quit and vacate the said premises by 31 August 1977.

The defendants on 29 September 1977, commenced an action in the District Court (DC Summons No. 4724 of 1977) against the plaintiff, claiming possession of the said premises and arrears of rent payable at $240 p.m. from 11 March 1974, and *mesne* profits from 1 September 1977. The plaintiff counterclaimed for specific performance of the agreements and to have leases granted to him from 1 August 1967, and 1 August 1977.

By an order of the High Court, in Originating Summons No. 416 of 1977, dated 23 January 1978, it was ordered that DC Summons No. 4724 of 1977 be transferred to the High Court and that it be consolidated with the present suit.

The said premises has since the commencement of the present suit been sold in 1978.

The defendants contend that the plaintiff was in breach of the said lease as he had failed to pay the increased rent of $240 p.m. with effect from 11 March 1974, in accordance with Clause 1 of the said lease.

The relevant portion of Clause 1 reads:

> - Paying therefor monthly during the said term the rent of Dollars One hundred and ten ($110)...Provided however that if the assessment on the said premises shall at any time within the said period be increased or decreased then and in such event the said rent shall also be proportionately increased or decreased accordingly.

The annual value of the said premises was increased from $1,320 to $2,880 with effect from 11 March 1974. The defendants say that in view of the increased assessment the rental payable by the plaintiff after that date is $240. This figure is arrived at by doing the following calculations:

$$\$110 \times \frac{\$2880}{\$1320} = \$240$$

or by taking 1/12 of $2880 = $240 (just as $110 is 1/12 of $1320).

The contention of the plaintiff is that the increase in rental is proportionate not to the increase in annual value but to the increase in assessment, which is 36% of the annual value. Calculated on this basis the increased in rental payable comes to $46.80 p.m., which together with the old rent of $110 makes $156.80.

According to the plaintiff's formula, the plaintiff is to pay all the increases in the property tax and the rental is to remain at $110. I do not think that is the proper interpretation of clause I. I am of the view that the interpretation of the defendants is the correct one - the rental should be increased based on the annual value. It is a simple formula of the rent being calculated at 1/12 of the annual value.

The evidence is clear that the plaintiff despite repeated requests has not paid or even tendered the proper rental payments in accordance with the said lease since March 1974. In consequence thereof the plaintiff was in breach of the said lease and therefore not entitled to renewal of the same.

The next question for consideration is whether clause 3 (c) of the said lease gave the plaintiff a perpetual right of renewal.

In *Caerphilly Concrete Products Ltd. v. Owen* ([1972] 1 WLR 372), by a lease dated 6 May 1963, the predecessor in title to the plaintiff landlords demised the premises to the tenant Owen for a term of five years from 1 January 1963, at a yearly rent of £10 payable by a single payment of £50 in advance. Clause 4(3) provided that on the written request of the tenant a lease for a further term of five years would be granted to him "at the same rent and containing the like covenants and provisos as are herein contained (including an option to renew such lease for a further term of five years at the expiration thereof)". The tenant, who had occupied the premises prior to 1963 under similar leases, by an oral agreement in 1957 sublet the premises to the landlords on a weekly sub-tenancy at the weekly rent of 30 s. and the landlords remained in possession under the sub-tenancy until 31 December 1967. On the 8th February, 1968, the landlords' predecessor conveyed to the landlords the freehold of the premises. The tenant's option to renew was not registered in the Land Changes Registry pursuant to the Land Changes Act, 1925, and no request in writing for the grant of a new lease was made. On 23 June 1969, the landlords issued a summons seeking a declaration that on the true construction of the lease the tenant was not entitled to a term of 2,000 years in the land demised thereby, and that in the events that had happened the tenant had no title to or interest in the land. Foster J held that the lease was perpetually renewable and dismissed the summons. The landlords appealed. The appeal was dismissed. The Court of

Appeal held that the lease was perpetually renewable since it was plain that by the words used the parties were explaining that the covenants and proviso contained in the first lease which it required the second lease to contain were to be construed as a reference to all those covenants, including an option to renew as defined by Clause 4(3).

Russel LJ in the course of his judgement said (p. 374):

> The approach to the question whether a lease is perpetually renewable is not in doubt. The language used must plainly lead to that result: though the fact that an argument is capable of being sustained at some length against that result does not of course suffice. As a matter of history, when a covenant by a lessor conferred a right to renewal of the lease, the new grant to contain the same or the like covenants and provisos as were contained in the lease, the courts refused to give literal effect to that language, which if taken literally would mean that the second lease would contain the same covenant (or option) to renew, *totidem verbis*, and so on perpetually. The reference to the same covenants was construed as not including the option covenant itself. This limited the tenant's right to one renewal. In order therefore to make it plain that the covenants to be contained in the second lease (to be granted under the exercise of the option to renew) were to include also the covenant to renew, draftsmen were accustomed to insert phrases such as "including this covenant", so as to achieve a perpetually renewable lease. As I have indicated, if they did not do this, the second lease would not contain any option clause.
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> The operation of the words of inclusion was not limited to requiring the second lease to contain a covenant to renew once more only, which would have been the outcome if the words of inclusion had been omitted in the second lease. This was because the words of inclusion could not properly be construed as requiring the second lease to contain the same covenants other than the covenant to renew but additionally to include an option to renew once more only - a total of three terms. The words of inclusion defined or explained what was meant by 'the same covenants", that is to say, as including the covenant to renew. Consequently in the second lease, in order to comply with the words of definition or explanation, the covenants referred to therein to be contained in the second lease must contain the same wording including the inclusion.
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> In the present case the brackets make it abundantly plain that the parties are explaining that 'containing the like covenants an a proviso" is phrase intended to embrace an option. That is to say that the covenants and provisos contained in the first lease, which the first lease requires the second lease to contain, are not to be construed as a reference to those covenants, and provisos other than an option to renew. But what covenant in the first lease (to be repeated in the second) can be regarded as such except clause 4(3)? The second lease must contain the clause 4(3) covenant. When the clause 4 (3) covenant speaks of "the like covenants and provisos" it defines them as including an option to renew. If the words of clause 4(3) are repeated in the second lease without the words of clause 4(3) are repeated in the second lease without the words in parenthesis the second lease will not be carrying out the requirement of the first lease: it will not be granting an option for a further lease containing "the like covenants" as defined.
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> It was argued that if this was intended the draftsman would have used the well known phrase "(including this covenant)". It is true that he might have done so, and that on this view he may be accused of verbosity. But on the other view, the draftsman would be guilty of including the option in the like covenants when he simply meant the second lease to contain an option to renew, and further of failing adequately to define the terms and conditions for the exercise of this independent, second and last option. The only reasonable construction of the language of clause 4(3) is such as to lead to a perpetually renewable lease, and accordingly in my view the appeal fails."

Sachs LJ said in his judgement (p.375):

> It is trite to say that when construing a document such as a lease it is the prime purpose of the Courts to seek to adopt a meaning that conforms to the intentions of the parties. Not even the most impeachable conveyancing logic, however neatly expressed, can convince me that in the instant case it was the mutual intention of the parties that the lease should be perpetually renewable. So far as the landlord is concerned it seems to me highly unlikely that he really intended that this particular lease could or should be "for ever". My doubts on this question of intention extend also to the tenant - for I would acquit him of any intent to lay a trap through the operation of the words enclosed in the brackets, which we know to have been added to the draft at the very last moment by his solicitors. It is difficult indeed, at any rate so far as I am concerned, to think that two business men would be talking in terms of five years if both - or indeed either - of them truly meant that a lease should be granted which went on *ad infinitum.*
>
> Were I in a position to give effect to the views just expressed that would result in the landlord succeeding in this appeal: but it is necessary to consider whether the authorities which were so fully and so helpfully cited to us permit such a result. An examination of the relevant decisions discloses an area of law in which the courts have manoeuvred themselves into an unhappy position.

He later said (p.377):

> ...
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> ...
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> I could wish that the Courts had followed the apparent reference of Lord Fitzgerald in *Swinburne v. Milburn* [1884] 9 App Cas 844, 855 for confining interpretations of perpetual renewability to time for ever hereafter" or some equivalent were used in the relevant document. This approach would have avoided that sort of path by which good logic can on occasion make bad law, and would have been in accord with the aphorism that at times 'logic is only the art of going wrong with confidence'.

And he concluded:

> Having, however, examined the authorities,I feel bound in this Court to say that the matter is concluded by them in that the words in brackets, as inserted at the last moment, have in law the same effect as those considered in *Parkus v. Greenwood* [1950] Ch 644.

Having regard to the authorities I too have to come to the conclusion that in the present case there is a perpetually renewable lease.

The defendants say that even if clause 3(c) created a perpetually renewable lease the plaintiff is nevertheless statute barred by s. 6 of the Limitation Act (Cap 10).

Section 6 reads:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract...
>
> (b) ...
>
> (c) ...
>
> (d) ...

The plaintiff submits that the said lease is not a contract and does not come within the provisions of s. 6. The argument of counsel for the plaintiff why a lease is not a contract is this. A lease creates a legal estate in the land; it is binding on all the reversioner and successors in title and the successors in title can sue the reversioners although there is no privity of contract. Further, the doctrine of frustration never applies to a lease; it is not liable to repudiation and acceptance as a contract is. All the covenants in a lease run with the land and all part and parcel of the land.

There is no substance in this submission. Originally the relationship of landlord an tenant was one of the contract only but from early times the contract conferred an estate in the land without losing all its contractual characteristics. In my view the said lease comes within the provision of s. 6(1)(a).

The question then arises as to when the cause of action accrued in this case. Counsel for the plaintiff submits that it accrued from unequivocal refusal to perform. The defendants do not dispute this. The plaintiff says that there is no such unequivocal refusal to perform until 3 August 1977, when the defendants served a notice to quit on the plaintiff asking him to deliver up possession on 31 August 1977.

It is for me to find from the facts when time actually started to turn. The plaintiff had as early as 3 January 1967, six months before the expiry of the said lease exercised his right under Clause 3 (c). When the plaintiff did not hear from the defendants he again wrote on 20 April 1967, (AB28B) drawing their attention to his letter of 3 January 1967, requesting for a renewed lease for a further ten years. When there was no reply it was obvious to the plaintiff that there would not be any response from the defendants and he instructed his solicitors to write to the defendants on 1 June 1967, (AB29) about the renewed lease. When there was no response by 31 July 1967, the plaintiff must have realised that the defendants were not going to comply with Clause 3(c). There was clear and unequivocal refusal to perform by the defendants. I find, therefore, that time began to run from 1 August 1967. The plaintiff should have taken immediate steps to enforce his rights which he failed to do. Instead he chose to write protracted correspondence with the defendants and threatening the defendants but did nothing to enforce his rights. If there was any doubt in the mind of the plaintiff, the letter of the defendants' solicitors (AB35) would have put the issue beyond doubt that the defendants had no intention of granting a further lease. The right of action of the plaintiff has accrued beyond doubt at least by 22 December 1967. More than six years have passed from the date on which the cause of action accrued.

Counsel for the plaintiff submits that although no formal document was executed the plaintiff nevertheless has a lease for ten years as the plaintiff had exercised his option, and both sides had performed it and the defendants had recognised the lease right up to 1977.

Counsel for the defendants submits that the holding over could not create a lease of ten years as such a lease would be void by virtue of s. 53 (1) of the Conveyancing & Law of Property Act (Cap 268). If a valid tenancy is created it would be one month to month because the tenant is paying a rental from month to month and at most a tenancy from year to year.

It is not necessary for me to decide on the point raised. The plaintiff has allowed his right to enforce the contract to become barred with the result that he can resist the defendants' claim to possession only by seeking to establish a title, the acquisition of which is forbidden by the Limitation Act. The Act disables him from contesting the defendants' right to possession.

Another defence raised by the defendants is that clause 3 (c) cannot be performed. The defendants submit that since 1960 it is an offence for the defendants to grant a lease for a term exceeding seven years without proper subdivision under the Planning Act, (Cap 279) which came into force in February 1960.

Section 9(3) of the Planning Act provides:

> No person shall subdivide any land unless:
>
> (a) he has obtained the written permission of the competent authority, and a copy of its written permission has been forwarded by the competent authority to the Collector...

Section 9(9) provides:

> Any person who contravenes the provisions of sub-section (1) or (3) of the section, is guilty of an offence under this Act and is liable on conviction to a fine...

The defendants submit that Clause 3 (c) of the said lease is subdivision within the meaning of the definition "subdivide" in s. 2(1) of the Act, which reads:

> - a person is said to subdivide land if, any deed or instrument, he conveys, assigns, demises or otherwise disposes of any part of the land in such a manner that the part so disposed of becomes capable of being registered under the Registration of Deeds Act or in the case of registered land being included in a separate folio of the land register under the Land Titles Act, and "sub-division" shall be construed accordingly: Provided that a lease for a period not exceeding seven years without the option of renewal or purchase shall not be deemed to be a disposal within the meaning of this definition;

The plaintiff contends that the defendants are not precluded from granting a further lease by the Planning Act. He submits that the said lease when originally granted having been capable of and having been registered under the Registration of Deeds Act was not a lease which "becomes" capable of being registered under the Registration of Deeds Act as a result of the disposal within the meaning of the Planning Act. I am unable to accept this submission.

The plaintiff then argues that the defendants could and should have applied for written permission for subdivision and that such written permission would have been granted if applied for.

It seems to me that it was never in the contemplation of the parties that subdivision should be applied for in respect of the said premises. The plaintiff says that the defendants are required to apply for sub-division of the said premises. That would be a fundamental change in the conditions of the said lease. I am of the view that by virtue of the Planning Act, Clause 3(c) is unenforceable as against the defendants and the defendants are released from their obligations thereunder.

In the result the plaintiff's claim must be dismissed with costs. There will be judgement for the defendants in terms of their prayers in District Court Summons No.4724 of 1977 and costs.

Also found at [1982] CLJ 477